**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In The Matter of<br><br>Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers | CC Docket No. 94-129<br><br>DOCKET FILE COPY ORIGINAL |

# REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

**TELECOMMUNICATION RESELLERS ASSOCIATION**

**Charles C. Hunter**
**Hunter & Mow, P.C.**
**1620 I Street. N.W.**
**Suite 701**
**Washington, D.C. 20006**

**Its Attorneys**

**February 8, 1995**

# TABLE OF CONTENTS

## SUMMARY

The Telecommunications Resellers Association reaffirms its support of the Commission's efforts to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge. But while supporting the adoption of such regulations as are reasonably necessary to achieve this end, TRA continues to encourage the Commission to carefully craft and narrowly tailor its safeguards against "slamming" so as not to create and impose unnecessary administrative and cost burdens on smaller IXCs or to inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers.

In a market dominated by a single carrier and in which that carrier and two others derive more than 85 percent of customer revenues, the ability to market creatively and aggressively and to efficiently close sales is critical to the competitive viability of the hundreds of smaller carriers who populate the remaining 10 to 15 percent of the market. In a highly concentrated market, rules and regulations which hinder customer acquisition disproportionately benefit entities with large, established customer bases, to the detriment of later market entrants and emerging providers. Thus, while TRA does not minimize the importance of ensuring that consumers are not wrongfully switched from one IXC to another, it submits that a number of commenters, in a well-intentioned, but misguided, frenzy to safeguard consumers from "slamming," would, if their proposals were implemented, inadvertently deny the very consumers they seek to protect the full benefits

associated with a competitive interexchange telecommunications market and a dynamic long distance resale community.

To avoid such a result, TRA urges the Commission, as it did three years ago in crafting procedures for verification of long distance telemarketing sales, to strike an appropriate balance between the interests of consumers and carriers, as well as between the benefits derived from a dynamic and competitive marketplace and the need to safeguard consumers against "slamming." And in so doing, TRA further urges the Commission to factor into its analysis the costs and burdens its actions would impose on smaller IXCs, as well as any dampening effect such actions might have on competition generally and specifically on the ability of smaller IXCs to market effectively. To paraphrase the PIC Verification Order, safeguards against "slamming" should "facilitate the IXCs' marketing efforts while maintaining the protection embodied in the requirement for LOAs" and should continue to reflect the Commission's "special concerns about potential costs imposed on smaller IXCs."

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

| | |
|---|---|
| **In The Matter of** | |
| **Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers** | **CC Docket No. 94-129** |

# REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its reply to comments addressing the rules proposed and the issues raised in the Notice of Proposed Rule Making, FCC 94-292 (released November 10, 1994) ("NPRM") in the captioned proceeding.

## I.

## INTRODUCTION

In its Comments, TRA supported the Commission's efforts to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge, agreeing with the Commission that "slamming" cannot, and should not, be tolerated. And while supporting the adoption of such safeguards as are reasonably necessary to achieve this end, TRA encouraged the Commission to

carefully craft and narrowly tailor safeguards against "slamming" so as not to create and impose unnecessary administrative and cost burdens on smaller IXCs or to inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers. Afterall, TRA argued, the consuming public has derived, and continues to derive, great benefit from the lower prices and enhanced customer service generated by a dynamic and competitive interexchange telecommunications marketplace. Moreover, TRA urged the Commission to bear in mind that any limitations on marketing inure to the benefit of large, established providers already possessed of substantial market shares.

TRA further pointed out that its carrier members are well aware that in the intensely competitive long distance telecommunications marketplace, fair and honest business practices are critical to the long term survival of individual resellers and the resale industry as a whole. Indeed, TRA emphasized that it is for this reason that it adopted at its inception, and continues to enforce, a strict "Code of Ethics" which requires its members generally to conduct business ethically and with integrity and specifically to commit not to "submit orders for provisioning without customer authorization or participate in 'slamming' activities."

Consistent with these views, TRA proffered the following recommendations:

- The Commission should not prescribe either the text or the font or point size of letters of agency ("LOAs"), adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility;

- The Commission should permit, but not require, resale carriers to identify on their LOAs their network providers so long as the role of the

underlying facilities-based carrier is clearly and unambiguously described;

- The Commission should not adopt a blanket prohibition on combining inducements and LOAs on the same document, prohibiting instead combinations of inducements and LOAs which obscure in a material way the purpose of the LOA to authorize a primary interexchange carrier ("PIC") change;

- The Commission should not to adopt any broad prohibition on the use of inducements in marketing long distance services or any limits on the nature of the materials that can be included in a mailing containing an LOA;

- The Commission should prohibit "negative option" LOAs;

- The Commission should not limit carriers' use of "800" numbers to market long distance service, but TRA would not oppose the extension of existing telemarketing verification procedures to "800" sales;

- The Commission should adopt a compensation scheme pursuant to which consumers would be made "whole," but not afforded a "windfall," in the event of an unauthorized PIC change and thus should limit compensation to an amount equal to the difference between the amounts paid by the consumer for long distance service following the unauthorized PIC change and the amount the consumer would have paid but for the unauthorized PIC change;

- The Commission should limit any compensation scheme to the residential market, applying it in the business environment only if bad faith or wrongful intent can be shown; and

- The Commission should not relieve consumers who have been wrongfully converted from one IXC to another of their obligations under optional calling plans, but should require the unauthorized IXC to reimburse wrongfully-converted consumers for one month's flat monthly charge under such optional calling plans.

TRA suggested that these recommendations, in combination, strike an appropriate balance between the interests of consumers and carriers, as well as between the benefits derived from a dynamic and competitive marketplace and the need to

safeguard consumers against "slamming." In evaluating its recommendations, TRA encouraged the Commission, as it did three years ago in crafting procedures for verification of long distance telemarketing sales,[1] to factor into its analysis the costs and burdens its actions would impose on smaller IXCs, as well as any dampening effect such actions might have on competition generally and specifically on the ability of smaller IXCs to market effectively. Thus, TRA urged the Commission to apply here the principals it articulated in the PIC Verification Order by adopting safeguards which will "facilitate the IXCs' marketing efforts while maintaining the protection embodied in the requirement for LOAs"[2] and by reemphasizing its "special concerns about potential costs imposed on smaller IXCs."[3]

## II.

## ARGUMENT

### A. Proposals Made By Certain Commenters Would Adversely Impact Competition In The Interexchange Market.

As TRA stressed in its Comments, in a market dominated by a single carrier and in which that carrier and two others derive more than 85 percent of customer revenues, the ability to market creatively and aggressively and to efficiently close sales is critical to the competitive viability of the hundreds of smaller carriers who populate the

---

[1] Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992) ("PIC Verification Order"), recon. denied, 8 FCC Rcd 3215 (1993).

[2] Id. at ¶48; see also Illinois Citizens Utility Board Petition for Rulemaking, 2 FCC Rcd 1726, ¶19 (1987) ("Illinois CUB Order").

[3] PIC Verification Order, 7 FCC Rcd at ¶45.

remaining 10 to 15 percent of the market. In a highly concentrated market, rules and regulations which hinder customer acquisition disproportionately benefit entities with large, established customer bases, to the detriment of later market entrants and emerging providers. The marketing advantages enjoyed by the major carriers by virtue of their size and market position are difficult enough for the smaller IXCs to overcome without the imposition of additional regulatory impediments.

TRA does not minimize the importance of ensuring that consumers are not switched from one IXC to another unless such a conversion is both intended and authorized. In their well-intentioned, but misguided, frenzy to safeguard consumers from "slamming," however, a number of commenters would, if their proposals were implemented, inadvertently deny the very consumers they seek to protect the full benefits associated with a competitive interexchange telecommunications market and a dynamic long distance resale community. As the Commission has long recognized, competition generally and resale specifically exert a downward pressure on long distance prices and enhance the number and quality of long distance service offerings.[4/] The lower prices and increased service quality and diversity that competition and resale generate redound primarily to the benefit of residential and small business users -- the very individuals and entities that safeguards against "slamming" are primarily designed to protect.

The question then is not whether efforts should be made to minimize "slamming;" no commenter has disagreed with the merits of this objective and TRA

---

[4/] Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261 (1976), recon. 62 F.C.C.2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), recon. 86 F.C.C.2d 820 (1981).

certainly does not. The real issue is the costs of this aim and the tradeoffs that must be made. Certainly, it is a given that "slamming" will never be eliminated. Those who are willing to engage in unethical and/or illegal behavior will always find a means of doing so. Even requiring written LOAs in every instance would not ensure that consumers are never switched from one IXC to another without their authority and/or knowledge; like any other document, LOAs can be forged by the unscrupulous. The reality is that whatever additional protections are adopted by the Commission will result in only an incremental improvement. And a price will be paid for that marginal advantage.

If the safeguards reach too far or are over broad, the price smaller IXCs will pay will be in the form of greater difficulties in acquiring new customers. The industry will pay a price in the form of a dampened level of competition. And consumers will pay a price in the form of the after effects of that reduced level of competition. The ethical and honest providers will undoubtedly suffer more because they will abide by the new regulations; the unscrupulous will simply ignore them until and unless they are prosecuted.

It is for these reasons that TRA has urged the Commission to carefully craft and narrowly tailor its safeguards against "slamming." To this end, TRA has endorsed the Commission's proposal that LOAs state in "clear and unambiguous" language that the customer is changing its long distance provider. And it is to this end that TRA has recommended that the Commission outlaw combinations of inducements and LOAs that are designed to confuse or mislead or which obscure in any material way the purpose of the LOA and has not opposed the banning of "negative option" LOAs. These

requirements will provide the Commission and the Courts with the ammunition necessary to effectively deal with those entities who would engage in "slamming." Any more detailed or stringent requirements or prohibitions would serve only to hamstring smaller IXCs without any offsetting benefits.

TRA thus continues to oppose blanket prohibitions on the use of inducements in the marketing of long distance service,[5/] as well as broadly-worded limitations on the combination of inducements and LOAs either on the same document or in the same mailing.[6/] TRA also continues to oppose limitations on the use of "800" numbers by carriers to market their services. And with respect to an issue of unique importance to the resale community, TRA continues to oppose regulations which would prohibit resale carriers from identifying their network provider on LOAs, with the caveat that TRA would support a requirement that if a network provider is identified on an LOA, its role must be clearly and unambiguously described.[7/]

---

[5/] As the Commission itself has recognized, inducements can be proper and effective marketing devices for attracting customers to an IXC service." NPRM at ¶12.

[6/] As MCI Telecommunications Corporation correctly points out (at pp. 9-13) raise First Amendment concerns as potentially unconstitutional infringements on commercial speech.

[7/] As TRA explained in its Comments, consumers, while they recognize that the resale carrier will be their primary IXC, nonetheless not infrequently require assurances that their calls will be routed over one or another carrier's physical network. Limiting the LOA only to identification of the primary IXC thus could impede the ability of resale carriers to compete effectively. And while the Commission's concern that consumers not be mislead or confused by the identification of multiple carriers on an LOA is obviously valid, that concern can be addressed simply by requiring that the LOA clearly and unambiguously identify the role of each carrier identified thereon.

With limited exceptions, TRA will not address here the many permutations on proposals to prescribe the form and content of LOAs and to limit the role of inducements in marketing long distance service suggested by commenters. In TRA's view, any requirements and prohibitions which are more detailed and stringent than those recommended by TRA would skew the balance struck by the Commission in the PIC Verification Order between carrier and consumer interests and between competition and regulation. Certain matters, however, require discussion beyond that contained in TRA's Comments,

TRA feels compelled to address suggestions by Allnet Communication Services, Inc. ("Allnet") that (i) LOAs be valid for only 90 days and usable only once (at 4-5), and (ii) that all telemarketing sales be confirmed by a signed LOA (at 14).[8] With respect to the former proposal, resale carriers need to be able to flexibly move their traffic from one network provider to another in order to manage their businesses. LOAs which expire with time or a single usage would deny resellers this option and thus hinder them in the legitimate conduct of their businesses. The latter proposal has already been addressed and rejected by the Commission in the PIC Verification Order.

As the Commission recognized in assessing the disadvantages of various means of verifying telemarketing sales, "carriers have had little success in having customers return the LOA and it tends to dampen competition."[9] Accordingly, the Commission, having considered "the arguments raised by the parties regarding the

---

[8] See also Comments of the National Association of Attorneys General Telecommunications Subcommittee at 11-12.

[9] PIC Verification Order, 7 FCC Rcd at ¶44.

burden of implementing improved verification procedures and hav[ing] weighed those costs against the need to protect consumers against unwanted changes in their long distance service" and "seek[ing] to benefit consumers without unreasonably burdening competition in the interexchange market," rejected proposals to require written LOAs in every instance and instead adopted four alternative means for verifying telemarketing sales.[10/] The Commission's conclusions there are no less valid today. A requirement that a written LOA be obtained to verify each and every telemarketing sale would have a devastating impact on the ability of smaller IXCs to acquire new customers. The Commission should not (and could not without issuance of a further notice of proposed rulemaking) destroy the delicate balance it struck in the PIC Verification Order.

TRA also opposes the suggestion by Pacific Bell and Nevada Bell (at p. 2) that carriers be prohibited from integrating fund raising for charities or other causes with their provision of long distance service. Pacific Bell and Nevada Bell offer little in support of this recommendation other than the summary statement that "the potential for abuse is so great" and that "[t]his type of procedure encourages the agent of the IEC to engage in heavy-handed behavior." The Pacific Bell/Nevada Bell proposal is a perfect example of the dangers inherent in the "blunderbuss" approach to regulation. Implementation of such an overly-broad prohibition would reach not only the entity which affirmatively disguises its LOA as a charitable contribution form with the intent to mislead and confuse, but legitimate carriers that have structured their businesses based on a philosophy of social consciousness and responsibility. For example, the Pacific Bell/Nevada Bell

---

[10/] Id. at ¶¶42-51.

proposal could reach Working Assets Long Distance, a TRA member that contributes a percentage of its revenues to nonprofit groups working for peace, human rights, economic justice and a clean environment as directed by its customers.[11/] Obviously, such an approach borders on the nonsensical.

**B. Preemption Of Inconsistent State Regulation Of PIC Changes Is Warranted.**

In its Comments, TRA endorsed the Commission's proposals to require that all LOAs "be printed with a type of sufficient size and readable type to be clearly legible," specify the customer's billing name and address and each covered telephone number, and confirm in "clear and unambiguous" language that (i) the customer is changing its primary interexchange carrier ("PIC") and is designating its newly selected carrier as its agent for the PIC change, and (ii) that the customer understands that it may designate only one long distance carrier per telephone number, that selection of multiple carriers will invalidate all PIC selections and that a PIC change may involve a charge. NPRM at ¶10. TRA opposed, and continues to oppose here, proposals to prescribe, in whole or in part, the form or content of LOAs. In TRA's view, the guidelines proposed by the Commission are sufficiently detailed to ensure that LOAs set forth clearly such information as is necessary to allow for informed consumer actions, without imposing on carriers

---

[11/] Since its formation, Working Assets Long Distance has contributed more than $3 million dollars to such causes.

unnecessary regulatory burdens.[12/] Any greater degree of specificity would disrupt this delicate balance, generating costs and administrative burdens without any offsetting benefit.

A specific concern identified by TRA in this respect is the potential for inconsistent Federal and state requirements. As TRA explained, if the Commission and the various state regulatory authorities were each to identify in precise detail the content and form of the LOAs that could be used within their respective jurisdictions, carriers could well be confronted with conflicting language and type specifications. Addressing and conforming to such conflicting requirements would be costly and burdensome for carriers. Carriers, for example, could be required to develop and employ multiple versions of LOAs or to address inconsistent requirements in single LOAs. Thus, TRA continues to strongly urge the Commission not to prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility.

In addition, TRA agrees with those commenters who have encouraged the Commission to preempt inconsistent state regulation of PIC changes, and in particular state requirements relating to the form and content of LOAs. Preemption is warranted where:

---

[12/] An example of such an unnecessary burden is the proposal that the customer's telephone number be preprinted on the LOA. Such a requirement would serve no purpose other than to limit marketing flexibility and increase administrative burdens. For example, a requirement of this nature would effectively deny carriers the option to acquire new customers through general advertising or mailings.

> (1) the matter to be regulated has both intrastate and interstate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate the [FCC's] exercise . . . of its own lawful authority" because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects.[13/]

Here PIC changes clearly impact both intrastate and interstate services. FCC preemption would be required to prevent a byzantine maze of inconsistent Federal and state requirements relating to PIC changes in general and the form and content of LOAs in specific. And inconsistent state requirements would clearly negate policy judgments by the FCC that more stringent or detailed requirements would adversely impact interexchange competition and the competitive viability of smaller IXCs. Interstate and intrastate regulation are not jurisdictionally severable in this instance because a customer can currently have only one IXC.

### C. Relieving Customers Of Their Obligation To Pay For Long Distance Service In The Event Of "Unknowing" PIC Changes Opens A "Pandora's Box."

In its Comments, TRA indicated that while it would not oppose the imposition on carriers who are guilty of "slamming" of the obligation to compensate for damages suffered consumers who are wrongfully converted to an IXC not of their choosing, it was concerned that a compensation scheme that did more than make the wronged consumer "whole" would be an open invitation to abuse. Accordingly, TRA supported the

---

[13/] Petition for Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., FCC 94-358, ¶14 (January 24, 1995) (citing Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510, 1515 (D.C.Cir 1990).

compensation scheme suggested by the NPRM (at ¶17) which would reimburse consumers for any amounts paid for long telephone service over and above the amount that they would have paid but for the unauthorized PIC change. TRA opposed an alternate compensation scheme which would relieve wrongfully-converted consumers altogether of the responsibility to pay the unauthorized IXC for the long distance telephone service it provided to them.

Having reviewed the comments addressing this issue, TRA reaffirms here its view that any compensation scheme which does more than make wrongfully-converted consumers "whole" would open a "pandora's box" for IXCs and the Commission. A compensation scheme which would relieve wrongfully-converted consumers altogether of the responsibility to pay for long distance telephone service would essentially provide consumers a "windfall." And such a "windfall" would provide the unscrupulous with an incentive to claim wrongful conversion in order to avoid payment of legitimate long distance charges. It would also impose undue penalties on carriers that had converted a consumer to their service in good faith only to find that the spouse or the relative from whom they had received authority for the PIC change was not actually empowered to grant that authority.[14/] In contrast, a requirement that the unauthorized carrier make the wrongfully-converted customer "whole" would compensate the consumer without providing an incentive to cheat, and would penalize the unauthorized carrier without unduly

---

[14/] In many instances, it is not clear whether a consumer has been "slammed" or merely experienced a case of "buyer's remorse" or simply refuses for whatever reason to acknowledge, after authorizing a PIC change, that such a change had indeed been authorized.

punishing carriers who are guilty of unintended, but nonetheless, unauthorized conversions.

TRA also wishes to reiterate its view that any compensation scheme adopted by the Commission should be applied only to residential, and not to business, users except in circumstances in which bad faith or wrongful intent can be shown. As the Commission recognized (NPRM at ¶15), in the business environment, there is a far greater chance that an executed LOA may not confer authority for a PIC change. A carrier that acts on an LOA which it knows to be signed by a person without authority should be required to make the business user "whole." But it would be inequitable to penalize a carrier that acts on an LOA signed by an employee or other representative of a business which the carrier in good faith believes grants it authority to implement a PIC change.

## III.

## CONCLUSION

By reason of the foregoing, TRA again endorses proposed Section 64.1150, as modified in a manner consistent with its Comments and these Reply Comments. As TRA has consistently argued, protections against "slamming" must be carefully crafted and narrowly tailored so as to effectively safeguard the consuming public while minimizing the regulatory burden and avoiding any adverse effect on competition.

Respectfully submitted,

**TELECOMMUNICATIONS RESELLERS ASSOCIATION**

By: 

Charles C. Hunter
Hunter & Mow, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

February 8, 1995

Its Attorneys